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AN EXCURSION INTO LEGAL PHILOSOPHY—MAIDEN VOYAGE

By

HOWARD NEWCOMB MORSE*

"Blessed are they which do hunger and thirst after righteousness: for they shall be filled."

—St. Matthew, Chapter 5, Verse 6.

Comparative negligence, comparative rectitude and voluntary manslaughter erroneously have been classified and treated separately by legal scholars. The truth is that the three constitute one legal doctrine. Under the first the lesser negligence of the plaintiff in effect is subtracted from the greater negligence of the defendant, and the plaintiff is awarded damages proportionate to the difference. Under the second the lesser statutory ground for divorce of which the libelant is guilty (drunkenness for example) in effect is held *malum prohibitum* (borrowing from the criminal law) or bad in a legal sense but only disapproved of in a moral sense while the more serious statutory ground of which the libelee is guilty (such as adultery) in effect is held *malum in se* or bad in a moral as well as a legal sense because it violates the Seventh Commandment, and a decree of divorcement is awarded the libelant. Under the third the provocation given the defendant by the victim in effect is subtracted from the criminal act of the defendant, and the defendant is awarded the difference in the form of mitigation of punishment, it being necessary, of course, that there be the element of provocation in order to preclude murder and that the provocation be less than the counter-act in order to preclude justifiable self-defense.

The doctrine of comparative fault has its origin in the canonical law: "When mutual injuries have been inflicted they offset each other, unless one of the parties, because the injury done by him was greater, ought to suffer some penalty, mitigated according to the requirements of the case."¹

Legal scholars heretofore have considered the constitutional law doctrine of judicial review (or unconstitutionality) and the corporation law doctrine of *ultra vires* as two separate and distinct legal doctrines. However, the truth is that these two constitute the one and the same doctrine of supersedence. The origin of the doctrine goes back to England in the year 1610 when Sir Edward Coke declared in the *Case of the College of Physicians* (or *Dr. Bonham's Case*)² that:

"And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and

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¹ Codex Iurus Canonici, Canon 2218, § 3.

² 8 Reports (Coke) 107, 114, 118 (1610).

reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void."

In America almost 200 years later Sir Edward Coke's theory was appropriated by Mr. Chief Justice Marshall in *Marbury v. Madison*.³ In that case he stated that:

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void."

In case of conflict just as a legislative act must bow to a constitution in the domain of public law so too must a corporate act bow to a charter in the realm of corporate law. The year after the *Marbury* decision Mr. Chief Justice Marshall declared in the case of *Head v. Providence Insurance Co.*⁴ that:

"He who authorizes another to make a writing for him, makes it himself; but with these bodies which have only a legal existence, it is otherwise. The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated."

Here is the emergence of the ultra vires idea. Several years later Mr. Chief Justice Marshall pursued the same thought in the case of *Trustees of Dartmouth College v. Woodward*⁵ wherein he stated that:

"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."

The Supreme Court of the United States is the highest level tribunal in America in practice but not in theory. It is in theory not a court of last resort but of second-to-last resort for the ultimate function of a court is not exercised in the United States. The Supreme Court can decide whether a law is in conflict with the Constitution but not whether a law is in conflict with morality.

Just as a corporate act performed in violation of a charter and a legislative act passed in violation of a constitution are void, so too should be a law in violation of our code of morality. A law would not be enacted by the Congress unless the Congress felt that in addition to authority in the Constitution for the law there was authority in our moral system for the law. But just as the Congress has been wrong about constitutional authority for laws (as the Supreme Court many times has pointed out) so too has the Congress been wrong about moral authority for laws. But lack of moral authority for a law is not pointed out because America has no court with such jurisdiction.

³ 1 Cranch 137, 177, 1 Curtis 368, 389, 2 L.Ed. 60, 73 (1803).

⁴ 2 Cranch 127, 169, 1 Curtis 459, 464, 2 L.Ed. 229, 243 (1804).

⁵ 4 Wheat. 518, 636, 4 Curtis 463, 489, 4 L.Ed. 629, 659 (1819).

What is needed is a Morality Court. It would be to a chancery court what a chancery court is to a law court in ameliorating inequity, inequality, injustice and immorality. Just as the power of the Supreme Court of the United States to decide whether a law is in conflict with the Constitution is known as judicial review, so the power of the Morality Court to decide whether a law is in conflict with morality would be known as moral review. Here would be a court not like the ecclesiastical courts of old which would deal only with things spiritual but a court which would answer the integrated needs of the whole fabric of modern human society, both temporal and spiritual.

The phrase "public policy" indicates man's groping in the darkness for a tribunal to render consistency to an inflexible standard of morality. A law passed by a state legislature must be within the public policy of the state. A contract may be denied enforcement by the state if contrary to the public policy of the state. And a law of the state consonant with the public policy of the state may be denied enforcement in another state if contrary to the public policy of such other state. Here we have a duality of public policies. The public policy of a state constitutes the recognition by the state of a moral authority for its law. Therefore, there can be but one moral authority for all the states or, for that matter, for all the nations of the western world. A duality of public policies simply belies the fact that one of the public policies is wrong. Thus, just as the Morality Court would decide in cases of conflict between law and morality, so too it would decide in cases of conflict between public policies.

It is supremely ironic that all people in a nation are conclusively presumed to know the secular law and are compelled to obey it but not the higher and better law, the sectarian law, in the image of which the secular law is imperfectly made. The First Amendment to the Constitution of the United States guarantees freedom of religion—freedom of the individual to choose the body of sectarian law to which he desires to be held accountable. But, to make an understatement, although there is freedom of religion there is no freedom of law—freedom of the individual to choose the body of secular law to which he desires to be held amenable. There are many instances of moral duties which are not legal duties because morality, unlike law, is all-inclusive. There is no statute of limitations on moral obligations. American modernity has given man freedom from religion but not freedom from law. Man in a gregarious environment cannot be given freedom from law. He has even less right to freedom from religion than he has to freedom from law. Religion as a God-given obligation supercedes the man-made obligation of law.

The civil law always is in a state of flux, but the ecclesiastical law, because of its divine origin and consequent infallibility, is immutable. The canonical law is primarily concerned with human values, the temporal law with property values. This is what caused—and continues—the great schism between the moral law and the civil law. The only way for the civil law to imitate more closely the moral

law is for there to be a change of accent in the civil law from property values to human values.

What is needed is an amendment to the Constitution of the United States and to the organic law of every sovereign nation in the world which would outlaw war.

Article 9 of chapter II of the Constitution of Japan of November 3, 1946 states that:

"Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the State will not be recognized."

This provision was forced upon a vanquished nation by a victor. How wonderful it would be for a nation voluntarily to adopt such a provision.

It would be even better if a denunciation-of-war organic amendment went beyond a mere statement of principle and policy and was cast in the same form as an incapacitating statute, specifying that the nation henceforth does not have the legal capacity to wage war. It would be a further improvement if such an organic amendment should be made non-amendable, such as is the provision in Article V (dealing with amendatory process) of the Constitution of the United States which declares: "Provided, . . . that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

Defensive warfare, on the other hand, is simply self-defense on an international level. If the organic law of every sovereign nation included a denunciation-of-war amendment in the form of a non-amendable, incapacitating provision, defensive warfare would result only if a nation violated her own self-imposed organic restraint by waging aggressive warfare. Even the canonical law states that: "The circumstance of legitimate defense against an unjust aggressor, if due moderation be observed, entirely excuses from crime; otherwise it merely diminishes imputability; and the same is to be said of provocation."⁶ How can this be reconciled with: "But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also"?

The greatest function of equity is in appropriate cases to exercise human moderation and thereby to exempt one from the harshness of the common law. The tenth maxim of equity, according to Pomeroy's classification, is that: "Equity will not suffer a wrong without a remedy." But equity relieves against the hardships of the common law only within the civil law fold. What is needed is a doctrine substantially equivalent to equity to temper the severity of the common and statutory law in proper cases within the province of the criminal law.

The doctrine of *epikeia*, which is based in the canonical law, should be adopted

⁶ Canon 2205, § 4.

as it would fill admirably this lacuna which in certain cases causes grave lack of justice tempered with mercy.

Delict liability should rest upon the State for injuries arising from the criminal acts or conduct of any of its citizens. Every criminal is a product of his environment in the restricted sense and of society in the generic sense. The only legalistic balance that can be struck between these two extremes is the State—the geographical boundaries of the State; for it is the law of the State with its territorial application which has been violated. It is axiomatic that every right bestows a corresponding onus. The State has been delegated the right to prescribe criminal laws and to punish for infractions thereof. This right carries with it the duty to accept tortious responsibility for injuries resulting from such violations.

Epikēia applied in the negative criminal sense would mean the excusing of guilt in a particular case by the court because:

(1) The operation of the law would result in such hardship for the defendant as would cause the conscience of society to suffer thereby;

(2) The intention of the framers of the statute, as represented by the moral background pertaining to such statute, manifests approval of the suspension of such statute in the particular case.

Epikēia applied in the positive criminal sense would mean the placing of delict liability upon the State by the court because:

(1) The absence of organic and statutory authority conferring tortious responsibility would result in such hardship for one injured by the criminal act of another as would cause the conscience of society to suffer thereby;

(2) The intention of the framers of the organic and statutory law, especially the bill of rights, as represented by the moral background pertaining to such statute, manifests approval of the suspension of such statute in the particular case. (For example, a case where the perpetrator is not apprehended or a case where the defendant is insolvent.)

The nearest approach to a realization of positive epikēia is represented by the case of *George Wong v. The City and County of San Francisco*, number 1783, decided in 1947 by the Appellate Department of the Superior Court of San Francisco County. Authority for the *Wong* case is the decision in *Brauer v. New York Central and Hudson River Railroad Company*⁷ by the Court of Errors and Appeals of New Jersey. In the *Wong* case there was a collision between a municipal trolley and a motor car due to the negligence of the trolley motorman. The money in possession of one of the three plaintiffs apparently was stolen by an unknown third party while such plaintiff was unconscious. The city contended that its delict responsibility could not be extended to include a loss occasioned by the commission of a crime by a third party. The court held the city liable for the loss of the money. Here we have, not delict liability upon the State in a criminal case, but

⁷ 91 N.J. Law 190, 103 A. 166, 1 A.L.R. 734 (1918).

delict liability upon a sub-division of the State in a delict case in which such sub-division is the defendant for a loss resulting from the commission of a crime. This symbolizes the opening wedge in obtaining a full recognition of positive epikeia.

A defendant accused of a crime cannot be convicted unless his guilt is proved beyond a reasonable doubt. The origin of this doctrine lies in the degree of proof necessary to prove heroic virtues or martyrdom and miracles to the Sacred Congregation of Rites preliminary to beatification.

P. Charles Augustine, O.S.B., D.D., in his "A Commentary on the New Code of Canon Law"⁸ (B. Herder Book Co., St. Louis, 1930) states that: "Full proof is one which convinces the judge and prompts him to give sentence without further investigation. A probatio semiplena or half-proof is one that leaves room for reasonable doubt." Since a probatio semiplena or half-proof is one that leaves room for reasonable doubt, a full-proof (plena probatio or plenam fidei facere) is one that leaves no room for reasonable doubt. In the same volume at page 389 of his work the Rev. Augustine states that for beatification: "The proofs must be full (plene) and no others are admitted."

Damian Joseph Blaher, O.F.M., A.B., J.C.L., in his "The Ordinary Processes in Causes of Beatification and Canonization"⁹ (The Catholic University of America Press, Washington, D.C., 1949) states that: "In causes of beatification and canonization the proofs must be altogether complete (omnino plena). Canon 2019. This by no means signifies that every proof offered in the ordinary processes must of and by itself be one that produces perfect moral certitude; it merely means that, in the over-all picture, no definite decision concerning beatification or canonization itself, or relative to those sentences of the Congregation of Rites which immediately precede the actual beatification or canonization, will be given unless the proofs, taken as a whole, are entirely full (omnino plena) and beget perfect moral certitude." Noval, *De Processibus*, II, 77.

In the secular courts proving criminal guilt beyond a reasonable doubt, if it ever could be done at all, would in itself constitute a miracle entitling the public prosecutor to future beatification.

How can we reconcile the criminal law doctrine that a defendant is presumed innocent until proved guilty beyond a reasonable doubt with the doctrine of the original sin of man and its canonical outgrowth,¹⁰ which states that: "When an external violation of the law has been committed, malice is presumed in the external forum until the contrary is proved"? If you can answer this question then you won't have any difficulty with the next question. After Cain slew Abel, Cain dwelt in the land of Nod, on the east of Eden, and took unto himself a wife. Where did the wife come from if Cain and Abel were the only children of the first man and woman on earth?

⁸ B. Herder Book Co., St. Louis, 1930, vol. 7, p. 192.

⁹ The Catholic University of America Press, Washington, D.C., 1949, p. 156.

¹⁰ Canon 2200, § 2.

The two scales held by Justitia contain presumptions and burdens respectively and are evenly balanced. The law casts certain rebuttable presumptions in favor of or against a plaintiff. If the presumption is in favor of the plaintiff it operates against the defendant, and if the presumption is against the plaintiff it operates in favor of the defendant. Each *praesumptio a lege* or presumption cast by the law in turn casts an *onus probandus* or burden of proof upon the party (plaintiff or defendant) against whom the presumption operates. Only if the burden is carried successfully by the party upon whom it is cast can the presumption be overturned. For example, in the criminal law the law casts a presumption of innocence in favor of the defendant. This presumption then casts a burden upon the plaintiff (the State). The burden thus cast is the requirement that the State must prove the guilt of the defendant beyond a reasonable doubt. If this is thought by the jury to have been done, then the presumption is overcome.

A presumption can't be measured in weight until first the burden which it casts is looked to. For example, proof beyond a reasonable doubt is the heaviest burden of proof known to the law. Therefore, the presumption of innocence of crime is a strong presumption indeed. However, when you consider that pawnbrokers in Michigan are required by law¹¹ to take thumb prints of pawnors you realize that many petty assaults are being made against the idea of a presumption of innocence. Also, consider the implication behind section 159(h) of the *Labor Management Relations Act*,¹² the so-called Taft-Hartley Law, of 1947, which conditions the recognition of labor organizations on the filing with the National Labor Relations Board of non-communist affidavits by the officers thereof, but does not require the officers of management to file non-communist affidavits. Thus, we have a presumption of innocence of communistic affiliation extended to the officers of management, but withheld from the officers of labor organizations.

Another example of the assaults being made upon the great presumption of innocence is represented by the case of *R. W. Claxton, Inc. v. Schaff*.¹³ The decision therein held that a motorist who leaves his keys in his motor car may be liable for damages if his vehicle is stolen and involved in an accident, the theory being that the owner made it easy for his vehicle to be stolen by leaving the keys in it. This assault upon the strong presumption of innocence perhaps is of the status of a grand, rather than a petty, assault because it victimizes all society by extending a prospective application of a presumption of guilt to all persons. In order to facilitate a third party plaintiff to recover damages, this decision does not merely charge the owner alone with liability but in effect also holds all other members of society as potential thieves.

Consistent with the sectarian doctrine of original sin but in conflict with the secular presumption of innocence is the criminal law defense of entrapment and

¹¹ Mich. Stat. Ann., vol. 14, § 19, pp. 740-2.

¹² 61 Stat. at L. 143, 29 U.S.C.A. § 159 (h) (1947).

¹³ 139 F.2d 303 (1948).

its family law counterpart, connivance. Here we have a situation where one secular doctrine (entrapment) is in conflict with another secular doctrine (presumption of innocence). The situation is unique in irony in that both of these doctrines, entrapment and presumption of innocence, exist within the same branch of the secular law (criminal law). Entrapment rightfully will be discarded as an accepted defense to crime when three analogies are recognized: (1) the doctrinal analogy of entrapment to the sectarian concept of temptation, (2) the symbolical analogy of the secular police officer (in whose mind the criminal enterprise suggested to the entrapped originated) to the sectarian satan who counsels the surrender to temptation, and (3) the doctrinal analogy of suggested secular crime to suggested sectarian sin.

The law casts a rebuttable presumption of incapacity to commit a delict or a crime in favor of infants between the ages 10 and 14. If an infant between these ages is accused of crime, then the law casts two presumptions in the infant defendant's favor—that of innocence and that of incapacity. The presumption of incapacity casts a burden on the State to prove the capacity of the infant defendant by a preponderance of evidence. This burden bears the least weight of the three principle burdens of proof known to the law. There are many rebuttable presumptions, but they must all fall within the three weight divisions determined by the law's three principal burdens of proof. These three are:

(1) The lightweight division—a bare preponderance of evidence in ordinary civil cases.

(2) The middleweight division—a "clear and convincing" or "clear and satisfactory" preponderance of evidence in certain classes of civil cases.

(3) The heavyweight division—proof beyond a reasonable doubt in criminal cases.

When a presumption is present, proof is contingent upon it. Proof is lessened if the presumption favors the plaintiff, increased if the presumption favors the defendant. There frequently are present two presumptions, one favoring the plaintiff and the other favoring the defendant. In such a case there is a subtraction of the lesser presumption from the greater, similar to the way in which the legal doctrines of comparative negligence and comparative rectitude work. There sometimes is present a multiplicity of presumptions on either or both sides.

All rebuttable presumptions, unlike those which are conclusive, are capable of flux. The presumption in favor of the defendant and the burden of proof incumbent upon the plaintiff constitute the same mathematical amount, the former actual, the latter potential. As the plaintiff proceeds to carry the burden, the mathematical amount representing the presumption gradually decreases in direct ratio to the increase of the mathematical amount representing the burden. If the burden is successfully carried, the mathematical amount representing potentiality is translated into actuality.

For example, we all know that innocence is a very strong presumption and

that proof beyond a reasonable doubt or to a moral certainty is a very strong burden. The two represent the same mathematical amount, let us say 90. At the outset the 90 representing the presumption is actual and the 90 representing the burden is potential. As the trial proceeds and the carrying of the burden is undertaken the actual 90 is first cut down to 89 and the lost point is shifted to the potential 90 to start transforming the potential 90 representing the burden into an actual 90. If and when there is a complete displacement of the actual 90 from the defendant to the plaintiff, the case has been made because proved. The scales of justice thus acquire a new meaning.

The law holds that a gambling contract is void *ab initio* as against the public policy of the State. The insurance business is excepted from the law. If a man insures a form of property he owns for \$25,000.00 (it being worth that amount to him and he thinking it worth that sum, but in reality it being worth only \$15,000.00) and the property is destroyed, he receives \$10,000.00 less than the amount of his insurance policy even though he paid higher premiums on a \$25,000.00 policy than he would have paid on one for \$15,000.00. After the loss he is not refunded the difference in premium rates. When a man enters into a contract of property insurance with an insurance company, he is betting against his own property and the company is betting for the property. Who are worth billions of dollars—the policy-holders or the insurance companies? Betting on the side of property in a capitalistic society is about as safe as betting heads while tossing a coin with heads on both sides.

"Thou shalt not kill." Consider the relative morality of life insurance. When a man enters into a contract of life insurance, he is betting with the insurance company against his own life. How far removed morally is this from suicide? And when a man has an insurable interest in another's life and proceeds to enter into a contract of life insurance on the other's life, he is betting with the insurance company against the other's life. How far removed morally is this from murder?

Consider casualty insurance. The insured loses a finger. He receives as compensation, let us say, \$1,562.81—not \$1,562.80 or \$1,562.82, but \$1,562.81. And, by the way, how much will the insurance company pay for the loss of a man's soul? The insurance company is a corporation, and all corporations are soulless. Corporations can commit acts of non-feasance and misfeasance, but not of malfeasance. So, since a corporation cannot do an evil thing, neither can it do anything good.

"Equal justice under law." These are at least noble words. Public policy, like the double-edged sword held by the blind-folded *Justitia* balancing the scales, cuts two ways. Just as public policy can permit any type of contract (such as insurance even though underwriting morally is gambling) so too it can prohibit any type of contract. Installment loan contracts contain acceleration clauses, meaning, for example, that if the first of twelve monthly installments is defaulted all other eleven installments also become immediately due. If the default is not the fault of the debtor, isn't he the one of all persons who deserves an extension rather

than a shortening of the length of time in which to repay the debt? Yet the law does not bother to look into the circumstances to find out whether the debtor is a victim of misfortune or a cheat. He is in effect presumed to be a cheat. This idea at least works in fine with the doctrine of the original sin of man.

Also, it is a common practice for public service companies to allow a discount on their bills for service to their consumers if the statements are paid within a certain time. Yet doesn't the consumer who is unable to pay the bill within the stipulated time need the discount, if it be given at all, more than the others? But the public service companies, like equity, follow the law. Thus, whether it be a penalty or a benefit such as a discount, the debtor class is given the former and denied the latter.

In Ohio the law¹⁴ provides for pawnbrokers to exact one of two monthly storage fees depending upon the size of the pledge in addition to the monthly rate of interest stipulated on the pawn ticket. Now a pledge agreement is a special form of bailment contract, and as such the very nature of the loan for which interest is charged includes storage of the pledge by the pledgee (or bailee) as a necessary part thereof. Thus a necessary part of the bailment relationship is paid for two different ways by the bailor. This is an example of a statutory perversion of the common law.

The law has a legal rate of interest. The legal rate doesn't mean much because usually the creditor can make the interest rate still higher up to another maximum if he reduces the contract to writing, and as a matter of practice he almost always does so. But the legal rate serves two purposes:

(1) If the contract is parol, the interest rate can't be higher than the legal rate.

(2) If the contract is reduced to writing and no interest rate is stipulated therein, then the legal rate prevails.

But what is the moral rate of interest (assuming for a moment that interest itself is moral)? If you can answer this question then you won't have any difficulty in answering the following question: If Adam was the world's first human being, then how is it that in Michelangelo's painting entitled "Creation of Adam" he is depicted with a navel?

Two paramount virtues which we are ostensibly interested in having inculcated into young children are thrift and religious faith. A commendable thrift program for little children once prevailed in the public primary schools of some of Chicago's suburbs. This program was described by the Appellate Court of Illinois in 1939 in the case of *Thrift, Inc. v. State Bank and Trust Co.*¹⁵ as follows:

"Savings deposits were accepted on a schoolroom basis by teachers on behalf of the (Evanston) banks. The children were given pass books and urged to make weekly deposits. The entry in the pass book in each

¹⁴ Page's Ohio Gen. Code Ann., vol. 4-A, § 6339-3.

¹⁵ 298 Ill. App. 501, 504, 19 N.E. 2d 126, 127 (1939).

case was made by the teacher. At the same time a carbonized duplicate deposit slip was made and later turned over to the principal, together with the money received. At the end of the day both money and deposit slips were collected by messengers from the respective banks."

Yet this worthwhile thrift project was held by the court to be unlawful on the ground that it violated an Illinois statute prohibiting branch banking.

Once many of the public primary schools and secondary schools in Illinois outside of Chicago had voluntary religious education classes for Roman Catholic, Protestant and Jewish children. This voluntary religious education program in many public primary and secondary schools in Illinois was described by the Supreme Court of Illinois in 1947 in the case of *People ex rel. McCollum v. Board of Education of School District No. 71*¹⁶ as follows:

"The record discloses that in the fall of 1940 the Champaign Council of Religious Education, a voluntary association of Jewish, Roman Catholic and Protestant faiths, was formed. They immediately sought and secured from the board of education of Champaign School District No. 71, permission to offer classes in religious education in grades four through nine. Qualified instructors, all material and books, as well as incidentals, were to be furnished at the expense of the council. Admission to the classes was to be allowed only upon the express written request of parents, and then only to classes designated by the parents. They were to be excused by the board from attendance in the grade schools for 30 minutes and from the junior high school for a period of 45 minutes in each week for participation in the religious education classes. Classes were to be scheduled so as not to interfere with the regular public-school classes after consultation with the public-school teacher. Each faith—Catholic, Jewish and Protestant, was to have its separate instructional classes and no expense in connection with the classes was to be borne by the board. Additional groups were to be freely permitted to participate upon the same terms. Lesson materials and curriculum were to be selected by a committee representative of all groups participating and in a manner to avoid any offensive, doctrinal, dogmatic or sectarian teaching. It is apparent the teaching was to be of the content of the Bible without interpretation or attempt at influencing belief in the doctrines or creeds of any church."

Yet, while the Supreme Court of Illinois sustained this meritorious religious education project, the Supreme Court of the United States in 1948¹⁷ nevertheless held the project unconstitutional on the ground that it violated the guarantee of religious freedom contained in the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment, the Court in effect holding freedom of religion to mean freedom from religion.

Mr. Justice Frankfurter in his concurring opinion summed up the attitude of the Supreme Court of the United States by stating that: "If nowhere else, in the

¹⁶ 396 Ill. 14, 16, 17, 71 N.E. 2d 161, 162 (1947).

¹⁷ 333 U.S. 203, 92 L. Ed. 648, 68 S. Ct. 461, 2 A.L.R. 2d 1338 (1948).

relation between Church and State, 'good fences make good neighbors'." But what the Court really did was to erect a "spite fence" on the part of the State against Christianity. Mr. Justice Jackson in his concurring opinion stated: ". . . we are likely to make the legal 'wall of separation between church and state' as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded." (Mr. Jefferson also founded the "wall of separation" metaphor.) To which I reply: "You and your colleagues and your immediate, but not more remote, predecessors already have."

Both of the foregoing cases arose in Illinois with opposite disposition by the Illinois courts but with the same unfortunate ultimate result. In the *Thrift* case the Illinois court (the Appellate Court) let technicality blind it to virtue. Do you suppose that the framers of the Illinois statute prohibiting branch banking would have considered a primary school a branch bank because little children were encouraged to make small deposits there in order to better teach them the virtue of thrift? A court always should weigh the relative good that a decision either way will accomplish. In the religious education case the Illinois court (the Supreme Court) decided correctly, but the Supreme Court of the United States made the same mistake that the Illinois Court did in the *Thrift* case.

There are so many conflicts within the law that there is an artificial branch of law known as conflict of laws. Significantly, by contrast, there are no conflicts within morality. Thus, the secular lacks the consistency of the sectarian. The greatest conflicts in the world are between the temporal and the spiritual. These conflicts stem from the fact that the civil is built upon reason while the ecclesiastical is built upon revelation. There are two principal conflicts between the corporal and the clerical. One is the Church's attitude of submission to material, but not spiritual, force as contrasted with the mundane preoccupation with defense against material force. A concrete example of secular adherence to defense against material force is the great rebuttable presumption in negligence law of the exercise of ordinary care. The Supreme Court of the United States, speaking through Mr. Justice McKenna, in 1903 in *Baltimore and Potomac Railroad Company v. Landrigan* declared that:

"The presumption (of due care) is founded on a law of nature. We know of no more universal instinct than that of self-preservation,—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming, and death. There are few presumptions based on human feelings or experience that have surer foundation."¹⁸

On the plane of aggression, that is, insofar as offense is concerned, morality approves of spiritual aggressiveness, which is symbolized by evangelism and by the missionary and the convert, but condemns material aggressiveness; to this the law pays only "lip service". Those men who in time of war carry over the

¹⁸ 191 U.S. 461, 474, 48 L. Ed. 262, 267, 24 St. 137, 140, 141 (1903).

sectarian attitude of submission into the secular world are either conscientious objectors or "draft-dodgers." But here the civil arm of the law extends a presumption of guilt so that such men are bound over to the criminal arm of the law, which in turn extends to them a presumption of innocence. The other principle conflict is the sectarian conception of original sin and the fall of man, analogous to a rebuttable presumption of guilt. It is the theory that man is naturally corrupt and evil and that as the condition precedent for his salvation he must prove beyond a reasonable doubt by good works and prayer that he is otherwise. The secular conception is the rebuttable presumption of innocence until proved guilty beyond a reasonable doubt in criminal law and the rebuttable presumption that a man does his duty and obeys the law until disproved by a preponderance of the evidence in civil law.